Supreme Court, U.S.
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In the
Supreme Court of the United States

GEORGE FLUELLEN,

Petitioner,

vs.

HANS G. WALKER, Superintendent,
Auburn, C.F.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARVIN B. SEGAL
Counsel of Record
59 Maiden Lane
New York, New York 10038
(212) 972-1000

JOHN W. MITCHELL
Counsel of Record
600 Third Avenue
New York, New York 10016
(212) 696-9500

45 pp

QUESTION PRESENTED FOR REVIEW

Whether the mandatory "articulation requirement" contained in the trial court's reasonable doubt instruction to the petit jury deprived the Petitioner of Due Process of law within the meaning of the Fifth Amendment of the United States Constitution.

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George Fluellen, respectfully petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, A-1 to A-13) is reported as *Fluellen v. Walker*, 41 Fed. Appx. 497, 2002 U.S. App. LEXIS 13642 (2d Cir. 2002).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 28, 2002. A petition for panel rehearing with suggestion for rehearing *en banc* was denied on October 30, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In 1989, Petitioner George Fluellen was indicted for conspiracy to distribute heroin, felony and intentional murder, and possession of criminal weapons. On March 14, 1990, he was convicted of those crimes in the Supreme Court of New York State, County of New York. Petitioner was sentenced to concurrent terms of 8 to 24 years on the conspiracy counts to be served consecutively to 22 years to life imprisonment on the murder counts.

Procedural History

Petitioner's conviction was appealed to the New York State Appellate Division, First Department. During the appeal Petitioner filed a supplemental *pro se* brief arguing that the trial court had improperly instructed the petit jury on reasonable doubt. The Appellate Division, First Department, found Petitioner's arguments to be "unpreserved or without merit."

In a *pro se* filing seeking leave to appeal to the New York State Court of Appeals, Petitioner once again challenged the trial court's reasonable doubt instructions. The application was denied. Two subsequent *pro se* applications for leave to appeal were also denied by the Court of Appeals. Ultimately, Petitioner filed a motion to vacate his conviction based on newly discovered evidence. That motion was denied by the trial court and leave to appeal was thereafter denied by the Appellate Division, First Department.

On April 9, 1997, Petitioner brought on a writ of error *coram nobis* before the Appellate Division, First Department, alleging ineffective assistance of appellate counsel upon the grounds that his counsel had failed to raise the issue of the trial court's reasonable doubt instruction in his direct appeal. Petitioner's writ was denied on August 7, 1997.

On April 21, 1997, Petitioner Fluellen, filed a petition seeking federal habeas corpus relief, with the *Pro Se* Clerk of the United States District Court for the Southern District of New York.

In response to Mr. Fluellen's federal habeas corpus petition, Magistrate Judge Peck issued a Report & Recommendation, finding that the Writ should be dismissed upon the grounds that it raised both exhausted and unexhausted claims. Thereafter, on September 7, 1997, United States District Judge

Kimba M. Wood, affirmed the Magistrate Judge's recommendations and the Writ was dismissed. *Fluellen v. Walker*, 975 F. Supp. 565 (SDNY 1997). On October 3, 1997, after the District Court was notified that Appellant's unresolved *coram nobis* claim had been denied, permission was granted Petitioner to re-submit his habeas corpus petition.

On May 26, 2000, the Magistrate Judge's Report & Recommendation on Petitioner's re-submitted Writ was filed in the District Court, recommending that the Writ should be denied since the trial court's instruction "... did not constitute constitutional error sufficient to justify habeas relief," but stating that since the "reasonable doubt charge is close to the line under Second Circuit precedent," a certificate of appealability should be granted limited to that claim." *Fluellen v. Walker*, ___F.Supp2d ___, 2000 U.S. Dist. LEXIS 8839 (SDNY 2000).

During review of the Magistrate Judge's Report by the District Court, the Petitioner not only argued the impropriety of the trial court's mandatory "articulation requirement" (which was an integral part of the reasonable doubt instruction), but also urged the companion issue that when the trial court gave the example of how one juror could be called upon by another to defend his views, the trial judge chose a juror of Puerto Rican decent (Miss Ortiz) and suggested that she might well be the one who would elect to challenge any juror who claimed to harbor a reasonable doubt as to the accused's guilt.

The problem with singling out Miss Ortiz, was that at the trial, racial confrontation was said to have played a substantial role in the defendant's motivation in committing the crimes charged. Indeed, the prosecution had portrayed the underlying incidents as evolving from a rivalry between the African-American defendants on trial, and their Hispanic adversaries, both groups who were purportedly warring over

control in an area of Spanish Harlem in New York City. Thus the unfortunate choice of a Hispanic juror for the trial court's example of which juror might challenge anyone wanting to vote not guilty, may well have had the effect of implying to all other jurors, that because of her ethnicity, Miss Ortiz would have a particular incentive to challenge anyone who claimed to have a reasonable doubt. As a result, racial dynamics became improperly infused within the mandatory articulation requirement, giving rise thereby, to the potential that an already unfairly prejudicial instruction would be further exacerbated.

That is to say, that given the underlying circumstances presented at the trial, any juror who harbored a reasonable doubt might anticipate that jurors of Hispanic decent — because of their ethnicity — would be more strongly motivated to challenge any juror expressing doubt as to the defendant's guilt. Accordingly, the level of intimidation which may have already existed — solely by virtue of the fact that the jurors had been told that they could be confronted by fellow jurors and would have to defend their position — may have been incrementally increased, facing the potential likelihood of a challenge by a ethnically motivated fellow juror. As a result anomalous dynamics were imported into, and improper pressures placed upon, the deliberative process.

On May 31, 2001, District Court Judge Wood issued an Order adopting the Magistrate Judge's recommendation to deny the Writ, finding "that the challenged instruction is constitutionally permissible." The Court held that:

> Given that the Supreme Court has never indicated either in a holding or in dictum that it would be unconstitutional to instruct jurors that, if asked by another juror, **a juror would have to articulate the reasons** for his or

her doubt, this Court cannot conclude that the instruction represents an unreasonable application of Supreme Court law on reasonable doubt". (emphasis supplied)

* * *

The Court adopts the Report's recommendation to grant a certificate of appealability. AEDPA sets forth that a certificate of appealability should issue 'if the applicant has made a substantial showing of a denial of a constitutional right.' See 28 U.S.C. 2253(c)(2)."

On appeal to the Second Circuit, Petitioner again presented the argument that the mandatory articulation requirement contained in the trial court's reasonable doubt instruction deprived him of Due Process of law. However, on June 28, 2003, the Circuit Court of Appeals issued a Summary Order affirming the judgment below.

The Circuit Court adopted a similar position to that of the District Court. It expressed the view that while the challenged reasonable doubt instruction was "perhaps unwise" and "not approved" and "could not be countenanced," it could not say, "viewed in the context of the overall charge," that "there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution" *Estelle v. McGuire*, 502 U.S. 62, 72 and n. 4 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990).

Nevertheless, the Circuit Court of Appeals acknowledged that in each of the prior cases in which it had reviewed articulation requirements and found them not sufficiently inimical to Due Process as to warrant reversal, none of the predecessor cases had presented a "mandatory" articulation requirement. As the Court observed:

> [In *Vargas* we opined] that it may be unconstitutional to suggest 'that a juror *will* be called upon to articulate his doubts, or that he *must* articulate them if so called upon' (citing) (emphasis in original). We reasoned, first, that some doubts may be reasonable, but not articulable, *id*, and it would run afoul of the Due Process Clause to prohibit a jury from acquitting on the basis of such doubts, *See Id*; and second, that some jurors may, consciously or not, 'look to the defendant to supply an articulable reason for doubt before voting to acquit."

Nevertheless, at least one Court in the Second Circuit has suggested that if a "mandatory" articulation, vis-a-vis one that is merely permissive, was presented for review, the instruction might well be deemed constitutionally defective.[1]

On August 28, 2002, a Petition for Rehearing with Suggestion for Rehearing *En Banc* was submitted to the Second Circuit Court of Appeals. On October 30, 2002, the Petition for Rehearing was denied.

The Reasonable Doubt And Mandatory Articulation Requirement Instruction Given By The Trial Court

The trial court's reasonable doubt instruction, which contained an internal mandatory articulation requirement, is reproduced for the Court's inspection below:

> A reasonable doubt is first a doubt as to guilt. That is, what it is a doubt about. A doubt as to guilt which arises from your careful evaluation of the nature and quality of

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[1] As the Court in *Larrea v. Bennett*, _____ F.Supp.2d _____, 2002 U.S. Dist. Lexis 10067 (SDNY 2002), observed; "[T]he Second Circuit to this day has not been presented with a case 'involving a mandatory articulation charge' and [therefore] has not [yet] adopted *Antommarchi* as a federal standard". A-

all the evidence in the case, or indeed from what you may find to be a lack or insufficiency of such evidence.

It is a doubt as to guilt which you are able to give a reason or a rationale explanation which is based upon your evaluation of the evidence or lack of evidence in the case.

Now let's assume that you are sitting around the jury room and let's assume a particular juror says I have a doubt. Then in other words, let's say that Ms. Ortiz can turn to that juror and say well, what is that a doubt about. And that juror would be expected to say, I have a doubt as to this defendant's guilt or this defendant's guilt or this defendant's guilt. And she can then say well, what is the reason for your doubt. And that juror would have to articulate, give a reason or a rationale explanation by pointing to items of evidence in the case or lack of evidence in the case. (Emphasis supplied)

All right, so the person could say Mr. Corralo could say, I have a doubt because of this in the evidence or that in the evidence. Or I believe the evidence does not satisfy this or that with respect to the case. All right so that would be a reasonable doubt.

Therefore jurors, it follows that if one doubt is that a defendant is guilty merely because of some hunch or a whim or speculation or a superstitious notion, then such a doubt is not a reasonable doubt since such a doubt is not based upon a careful and thoughtful evaluation of the evidence in the case. Nor is that kind of a doubt a rationale doubt.

If one doubts that a defendant is guilty merely because of sympathy for him or because of a desire to avoid

> what might very well appear to be a very disagreeable task, then that type of doubt is not a reasonable doubt because it is not based on the evidence or lack of evidence in the case."

As the instruction set forth above makes clear, the trial court imposed a "mandatory" articulation requirement on the petit jury. Indeed, as the relevant portion of the charge instructs, any juror who represents that he has a reasonable doubt could be called upon by any or all of his fellow jurors, and at that point he would ". . . **have to articulate, give a reason or a rationale explanation by pointing to items of evidence in the case or lack of evidence in the case.**" (Emphasis supplied)

REASONS FOR GRANTING THE PETITION

As a result of the trail court's charge in the instant case, imposing as it did, a mandatory "articulation requirement," the Petitioner George Fluellen, was deprived of constitutional due process. As this Court observed in *In re: Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The phrase, "articulation requirement," has come to refer to an instruction by a trial judge — which, although there are various formulations — fundamentally admonishes the jury that in order for a juror to have a reasonable doubt as to an accused's guilt, that juror — and in the case of a mandatory articulation requirement — must, if called upon by a fellow juror, articulate a good reason therefore.

For the reasons set forth below it is respectfully asserted that this Court should agree to hear this case. Jury instructions that contain "articulation requirements," are an ever

present and continuing matter in controversy in the trial courts of this country.[2] Further, *stare decisis* on this issue, both in the federal and state trial and appellate courts is uneven and inconsistent and fails to produce a coherent position as to what is permissible and what is not, or where the boundaries of Due Process lie. It is essential for this Court, not only to establish the necessary constitutional parameters in this area, but to provide the requisite guidance to the lower courts as to how such parameters operate and are to be applied. To this end, the facts of this case provide this Court with an unique opportunity to define and establish constitutional standards that will have application well beyond the instant proceeding and which will make the trial of criminal cases in this country a more fair and just process.

The inclusion of a mandatory "articulation requirement" in a reasonable doubt charge holds the potential to deprive a defendant of Due Process of law in at least three ways.

First, such an instruction leads the jury to the erroneous conclusion that any "doubt" sufficient to justify acquittal must not only be "reasonable," but "articulable," and that is simply not the case. Indeed, as the panel of the Second Circuit that authored the opinion below conceded: "In *Vargas*, we implied that it may be unconstitutional to suggest 'that a juror will be

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[2] See, for example, *Dunn v. Perrin*, 570 F.2d 21, 23 (1st Cir.), cert. denied, 437 U.S. 910 (1978) [Formulation 'doubt . . . for . . . which a reasonable person can give or suggest a good and sufficient reason' held improper, although not by itself cause for reversal]; *People v. Antommarchi*, 80 N.Y.2d 247,251-252, 590 N.Y.S.2d 33 (1992) [trial court's jury instruction on reasonable doubt was erroneous because it imposed upon the jurors an affirmative obligation to specifically articulate the basis for any reasonable doubt]; *State v. Francis*, 151 Vt. 296, 303; 561 A.2d 392 (Sup. Ct. Vt. 1989): *State v. Boswell*, 294 S.E.2d 287, 295-96 (W. Va. 1982) [Instruction that reasonable doubt is one for which juror "should be able to give a good and substantial reason" held reversible error].

called upon to articulate his doubts, or that he must articulate them if so called upon. (citations omitted) **We reasoned, first, that some doubts may be reasonable, but not articulable, id., and it would run afoul of the Due Process Clause to prohibit a jury from acquitting on the basis of such doubts.**" *Fluellen v. Walker*, 41 Fed. Appx. 497, 2002 U.S. App. LEXIS 13642, *14-15 (2d Cir. 2002).

Second, such an instruction gives rise to the likelihood that jurors will feel compelled to look to the defendant or to one another to supply an "articulable" doubt, thus shifting the burden of proof away from the prosecution. "We recently have noted that [jury] charges which state or imply that a juror ought to be able to 'articulate' or 'give' a reason for acquittals present dangers of shifting burdens of proof because the jury may look to the defendant to supply that reason." *Beverly v. Walker*, 118 F.3d 900, 903 (2d Cir. 1997).

Third, and perhaps most pernicious of all, "mandatory articulation requirements" (and particularly the one formulated at bar) leave each juror with the unfounded belief that anyone who might otherwise be disposed to vote not guilty, can well be called upon to — and must affirmatively "articulate" and defend his reasoning to, and in front of, all of his fellow jurors. While everyone might wish it were otherwise, the frailty of the human condition is a dynamic that exists in all of man's endeavors — the jury system being no exception. By overlaying this entirely unjustifiable requirement upon the jury's deliberative process, a genuine and unacceptable risk is created that all jurors will not feel the unfettered freedom to vote their conscience. Jurors may remain silent, whether by virtue of their individual reticence, timidity, feelings of inadequacy in their verbal or expressive skills or for any of a host of reasons. And as a result thereof, a man

may be convicted of a serious crime even though twelve of his citizens have not genuinely and unanimously concluded that he is in fact guilty.

As the Fifth Circuit Court of Appeals correctly observed in *Humphrey v. Cain*:[3]

> **A reasonable doubt instruction is not a technical nicety; for a jury, it is a basic proposition of its constitution.** Undecided jurors may analyze their own doubts time after time in light of the instruction before settling on a decision. By the same token, jurors who have already made up their minds may recite the instruction time after time in order to bring undecided jury members over to their side. Insisting that a juror be able to articulate a reason is a troublesome step upon residual doubt. But our focus today is upon an instruction that went further. **A juror favoring guilt would have a powerful tool if he could demand that undecided jurors articulate good reasons for considering an acquittal.** Such a juror could use Humphrey's reasonable-doubt instruction to argue that it's not enough to have a reason to acquit — that one must have an especially strong, compelling, or persuasive reason for doubting the defendant's guilt. He could plausibly assert that a paucity of government evidence should not count as a "good" reason. **Under this sort of pressure, inarticulate and undecided jurors are less likely to give defendants the benefit of their doubts. Requiring articulation of good reasons, then, skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain**

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[3] See, *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997), reasoning adopted in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir. 1998)(*en banc*), cert. denied, 525 U.S. 935, 142 L. Ed. 2d 287, 119 S. Ct. 348 (1998).

> **actions in the jury room — actions that many individuals find difficult or intimidating — before they may vote to acquit.** (emphasis supplied)

There can be no question but that a mandatory articulation requirement fundamentally and unconstitutionally, alters the mechanisms of the American jury system and thereby deprived the accused of Due Process of law.

Indeed, in a similar condemnation of articulation requirement instructions, Circuit Judge Newman, in his dissenting opinion in *Chalmers v. Mitchell*, 73 F.3d 1262, 1274 (2d. Cir. 1996), emphasized that imposing an obligation upon jurors to articulate their reasons for believing that a reasonable doubt exists as to the accused's guilt, is antithetical to settled principles of due process. As Judge Newman explained:

> **[There is simply] no obligation whatever upon any juror to explain the juror's thought processes to the other members of the jury. No juror need give any reason for entertaining a reasonable doubt about a defendant's guilt**, much less the "good" reason required by the trial judge's instruction to the jury that convicted Chalmers.
>
> **The vice of such an instruction is that a juror not persuaded of guilt beyond a reasonable doubt might feel obliged to abandon a vote for acquittal because the juror feels unable to articulate to the other jurors the reason for doubting the defendant's guilt.** Though jurors are regularly instructed to listen to each other's views, they are never placed under an obligation to articulate their views to other jurors, or even to formulate for themselves their individual reasons for not being persuaded of guilt. A juror is entitled simply to have a gut feeling that, after consideration of all the evidence, a reasonable doubt remains in the juror's mind.

> Defining reasonable doubt as a doubt for which some good reason can be given tells jurors that a doubt in their minds is not a reasonable doubt unless a good reason can be given. It tells the jurors that having a reasonable doubt is not a sufficient basis on which to vote not guilty; they may vote not guilty only if the doubt in their minds is one for which they can "give[ ]" — that is, articulate — a reason. (emphasis supplied)

How could it ever be said that an instruction that alters the bedrock of the deliberative process — that imposes upon a juror an obligation to articulate and defend his position, when no such obligation exists — could ever pass constitutional muster? How could a jury charge which instructs that for a doubt to be "reasonable," it must be "articulable," be deemed anything but *per se* prejudicial — when it is the law that a "reasonable doubt" need not be "articulable." How can a conviction be left to stand in the face of a jury charge that holds the potential to shift the burden of proof in a criminal case from the prosecution to the defendant, because the jury may look to the defendant or to his fellow jurors to supply the necessary "articulable" reason to otherwise justify a vote of not guilty.

Finally, some brief discussion is warranted concerning the conclusions of the Court below that other language contained in the charge sufficiently ameliorated the articulation requirement language, so as to prevent the likelihood that any due process violation may have occurred. "[V]iewed in the context of the overall charge . . . there is [no] reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Fluellen* v. *Walker*, 2002 U.S. App. LEXIS 13642, at pg. *15-16.

It seems fair to assume that for the impact of an erroneous charge to be effectively diluted by other language contained in court's instructions — and diluted to a sufficient magnitude to justify the conclusion that there was no reasonable likelihood that its potentially injurious impact infected the jury's deliberative process — there must be a certain level of complimentary cancellation. That is to say, disparate concepts do not operate to dilute or cancel one another, rather it must be a concept that relates to the same issue or dynamic as the offending portion of the charge for effective dilution or cancellation to occur.

In this regard, pointing to several statements in the charge which the Circuit Court felt supported its conclusion that there were sufficient "surrounding passages" which operated to countermand the effect of the mandatory articulation requirement, the panel stressed that the trial court had also charged that: "the only way that the presumption of innocence can be destroyed is by all of [the jurors] agreeing on the basis of the evidence that the defendant is guilty beyond a reasonable doubt."[4]

The reason why the Petitioner would argue that this language could not have operated to have the necessary diluting effect, is that the concepts of the presumption of innocence and of the requirement of proof beyond a reasonable doubt, don't really relate to the problem caused by the mandatory articulation requirement. That is, it is not at all inconsistent that a juror might well understand that a defendant is presumed innocent and that he can only be convicted if all jurors agree that the government has proved their case beyond a reasonable doubt — and yet at the same time believe that residual doubt did not qualify as a "reasonably doubt" and/or that a juror might well be too intimidated by the prospect that

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[4] *Fluellen v. Walker*, 2002 U.S. App. LEXIS 13642, at pg. *16.

he would have to advance a cogent "reason or rational" to his fellow jurors if he were to vote not guilty, and thereby simply silently elect to fold his cards.

Likewise, the Petitioner would respectfully take issue with the conclusion that the portion of the trial court's instruction that stated that — "the burden of overcoming that presumption [of innocence] . . . never shifts to the defense" — provided adequate amelioration, from a constitutional perspective, to the effects of the mandatory articulation requirement. This is so, because as the Second Circuit Court of Appeals observed in *Vargas v. Keane*, 86 F.3d 1273 (2d Cir. 1996), the potential "burden shifting" effect of an "articulation requirement" is two fold, that is, that "the instruction is reasonably likely to have compelled the jurors to look to the petitioner **or to one another** to supply an articulable doubt, thus shifting the burden of proof away from the prosecution." (Id. at 1278, emphasis supplied). Self-evidently, the additional language of the charge, that the burden "never shifts to the defense," has no impact whatever upon the effect of the charge to throw the burden of establishing that there is a reasonable doubt upon the individual veniremen.

Most respectfully for all of these reasons, a Writ of Certiorari should issue in the instant case.

CONCLUSION

A Petition for a Writ of Certiorari should be granted in the instant case to review the decision of the Second Circuit Court of Appeals, and upon such review, an Order of this Court should issue, vacating the conviction of the Petitioner upon the grounds that it was obtained in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution. And for such other and further relief as this Court may deem just and warranted.

Respectfully submitted,

Marvin B. Segal, Esq.
John W. Mitchell, Esq.

Attorneys for the Petitioner,
George Fluellen

Dated: January 27, 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

UNITED STATES COURT OF APPEALS
FILED
OCT 30 2002
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of October two thousand two.

GEORGE FLUELLEN,

Petitioner-Appellant,

V. Dkt No: 01-2474

HANS G. WALKER, Superintendent,
Auburn C.F.,

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant George Fluellen.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

UNITED STATES COURT OF APPEALS
FILED
JUN 28 2002
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of June two thousand and two.

PRESENT:

HONORABLE GUIDO CALABRESI,
HONORABLE ROBERT D. SACK,
HONORABLE BARRINGTON D. PARKER, JR.
Circuit Judges.

GEORGE FLUELLEN,

Petitioner-Appellant,

– v. –

No. 01-2474

HANS G. WALKER, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Appearing for Appellant: MARVIN B. SEGAL, London Fischer LLP, New York, NY.

Appearing for Appellee: DONALD J. SIEWERT, Assistant District Attorney (Robert M. Morgenthau, New York State District Attorney for the County of New York), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court, dated June 8, 2001, be, and it hereby is, **AFFIRMED.**

George Fluellen, convicted of, *inter alia*, murder, burglary, and conspiracy in Supreme Court, New York County, on March 14, 1990, and presently incarcerated, appeals from a judgment of the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*) adopting for the most part the Report and Recommendation of Magistrate Judge Andrew J. Peck, *Fluellen v. Walker*, No. 97 Civ. 3189, 2000 WL 684275, 2000 U.S. Dist. LEXIS 8839 (S.D.N.Y. May 25, 2000) ("*R&R*"), and substantially for the reasons stated therein, dismissing Fluellen's petition for a writ of habeas corpus. Because the court determined that Fluellen had made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), however, it issued a certificate of appealability limited to the question whether the reasonable-doubt instruction delivered by the state trial court "represent[ed] an unreasonable application of clearly established federal law." Order of May 31, 2001, at 11.

Magistrate Judge Peck's Report and Recommendation sets forth the facts. *R&R*, 2000 WL 684275, at *1-*5, 2000 U.S. Dist. LEXIS 8839, at *1-*13. Briefly, in 1989, a New York grand jury indicted Fluellen for conspiracy to distribute heroin, felony and intentional murder, burglary, and possession of criminal weapons. *Id.*, 2000 WL 684275, at *1, 2000 U.S. Dist. LEXIS, at *1. After a two-month trial at which "the jurors heard sixty-nine witnesses and examined more than 200 exhibits," Fluellen was convicted. *Id.*, 2000 WL 684275, at *1, 2000 U.S. Dist. LEXIS, at *2.

Fluellen appealed his conviction to the New York State Appellate Division, First Department. In a supplemental *pro se* brief, he argued that the trial court "improperly instructed the jury on reasonable doubt." *Id.*, 2000 WL 684275, at *3, 2000 U.S. Dist. LEXIS, at *9. The First Department found this argument, together with many others unspecified, "to be either unpreserved or without merit." *People v. Fluellen*, 194 A.D.2d 486, 487, 599 N.Y.S. 574, 575 (1st Dep't 1993).

Fluellen sought leave to appeal to the New York Court of Appeals. In a *pro se* filing, he again challenged the state court's reasonable-doubt jury instruction. Leave to appeal from the Court of Appeals was denied twice: on December 15, 1993; *People v. Fluellen*, 82 N.Y.2d 894, 610 N.Y.S.2d 161 (1993), and on March 7, 1994, 83 N.Y.2d 852, 612 N.Y.S.2d 384 (1994). *See R&R*, 2000 WL 684275, at *4, 2000 U.S. Dist. LEXIS, at *10. Fluellen then made a motion pursuant to N.Y. Crim. Pro. Law § 440.10 to vacate his conviction based on newly discovered evidence. The state trial court denied the motion, and the First Department denied Fluellen leave to appeal. *R&R*, 2000 WL 684275, at *4, 2000 U.S. Dist. LEXIS, at *10.

On April 9, 1997, Fluellen moved the First Department for a writ of error *coram nobis*. He alleged ineffective assistance of appellate counsel. He argued that appellate counsel should have argued that trial counsel provided ineffective assistance

by failing to object to the reasonable-doubt instruction. The First Department denied Fluellen's motion on August 7, 1997. *People v. Fluellen*, 242 A.D.2d 408, 661 N.Y.S.2d 689 (1st Dep't 1997). *See R&R*, 2000 WL 684275, at *4, 2000 U.S. Dist. LEXIS 8839, at *10-11.

In 1997, before the First Department denied Fluellen's petition for a writ of error *coram nobis*, Judge Wood dismissed without prejudice his initial federal habeas petition as "mixed," i.e., containing both exhausted and unexhausted claims. *Fluellen v. Walker*, 975 F. Supp. 565 (S.D.N.Y. 1997). *See R&R*, 2000 WL 684275, at *5, 2000 U.S. Dist. LEXIS 8839, at *12. On October 3, 1997, after he fully exhausted his claims in the state courts, Judge Wood permitted Fluellen to resubmit his habeas petition and referred it to Magistrate Judge Peck for a recommendation. *R&R*, 2000 WL 684275, at *5, 2000 U.S. Dist. LEXIS 8839, at *12-*13.

Magistrate Judge Peck determined Fluellen's challenge to the state court's reasonable doubt instruction not to be procedurally barred, *id.*, 2000 WL 684275, at *5, 2000 U.S. Dist. LEXIS 8839, at *14-*15, but he concluded on the merits that "while this charge language is to be discouraged," considered in its entirety, the "charge here did not constitute constitutional error sufficient to justify habeas relief." *Id.*, 2000 WL 684275, at *9, 2000 U.S. Dist. LEXIS 8839, at *29.

Judge Wood substantially adopted Magistrate Judge Peck's Report and Recommendation and denied Fluellen's petition. She concluded that "the instruction at issue in this case, which stated that jurors *must* articulate a basis for their doubts if called upon to do so, represents a variation on the instructions upheld in prior caselaw," but that "the variation is slight and does not provide a valid basis for habeas relief." Order of May 31, 2001, at 7 (emphasis in original). She declined, however, to rule "that the challenged instruction is constitutionally *permissible*," holding only that it did not constitute

an "unreasonable application" of clearly established Supreme Court precedent, "as required for habeas relief." *Id.* at 9 n.2 (emphasis added).

Because our cases have discouraged similar reasonable-doubt instructions in the past, *see, e.g.*, *Vargas v. Keane*, 86 F.3d 1273, 1278-79 (2d Cir. 1996); *Chalmers v. Mitchell*, 73 F.3d 1262, 1268-69 (2d Cir. 1996), and because the New York Court of Appeals has held that such a reasonable-doubt instruction violates the Due Process Clauses of the New York State and United States Constitutions, *People v. Antommarchi*, 80 N.Y.2d 247, 252, 590 N.Y.S.2d 33, 36, 604 N.E.2d 95, 98 (1992), Judge Wood issued a certificate of appealability limited to the question whether the state court's reasonable-doubt instruction violated clearly established federal law. *See* Order of May 31, 2001, at 10-12.

We review *de novo* the denial of a petition for a writ of habeas corpus. *Lainfiesta v. Artuz*, 253 F.3d 151, 154 (2d Cir. 2001). We note at the outset that the district court correctly exercised habeas jurisdiction over Fluellen's claim challenging the constitutionality of the state trial court's reasonable-doubt instruction. While the Appellate Division found this claim "to be either unpreserved or without merit," *Fluellen*, 194 A.D.2d at 487, 599 N.Y.S.2d at 575, the Supreme Court has made clear that "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case *clearly and expressly states* that its judgment rests on a state procedural bar," *Harris v. Reed*, 489 U.S. 255, 263 (1989) (emphasis added; internal quotation marks omitted); *accord Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000). The phrase "either unpreserved or without merit" is not a clear and express statement.

The district court therefore adopted Magistrate Judge Peck's recommendation that it review Fluellen's claim on the merits, *see* Order of May 31, 2001, at 5, and applied the

standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. *See* 28 U.S.C. § 2254(d)(1) (directing federal courts to inquire only whether a state court's adjudication "on the merits" of a habeas petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"); *see also Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (opinion of O'Connor, J.) (explaining the "contrary to" and "unreasonable application" clauses). The court held that the state court's reasonable-doubt instruction, while perhaps unwise and possibly erroneous, did not "represent[ ] an unreasonable application of Supreme Court law on reasonable doubt." Order of May 31, 2001, at 9.

We conclude that even were we to review the state court's reasonable-doubt instruction *de novo*,[1] it would not run afoul

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[1] The district court decided this case before our decisions in *Sellan v. Kuhlman*, 261 F.3d 303 (2d Cir. 2001), and *Rudenko v. Costello*, 286 F.3d 51 (2d Cir. 2002). In *Sellan*, we held that "a state court adjudicates a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment[,] . . . even if the state court does not explicitly refer to either the federal claim or to relevant federal case law." 261 F.3d at 312 (internal quotation marks and alterations omitted). We also held that to determine whether an ambiguous state appellate-court decision constitutes an "adjudication on the merits," a federal habeas court should follow certain analytic steps. *Id.* at 314 (quoting and adopting the test set forth by the Fifth Circuit in *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999)). In *Rudenko*, however, we stated that where "it cannot be determined from the state-court opinion whether the denial of a given claim was based on a procedural ground rather than on the merits, no AEDPA deference is due the state-court decision on that claim." 286 F.3d at 69; *see also id.* at 71 (stating that where a state appellate court "reject[s] in bulk undiscussed — and perhaps unlisted — claims by stating that they [a]re 'either' meritless 'or' procedurally barred, . . . no AEDPA deference by the district court on these claims [i]s warranted"). We need not decide *Rudenko*'s effect, if any, on the holding in *Sellan*. We conclude that the state court's

of the Constitution. The instruction, considered as a whole, cures the error, if any, in the portion challenged by Fluellen's habeas corpus petition.

Fluellen argues principally that the trial court committed an error of constitutional magnitude by defining reasonable doubt in pertinent part as a doubt for which

> you are able to give a reason or a rational[ ] explanation which is based upon your evaluation of the evidence or lack of evidence in the case. [If one juror were to ask another about the reason for his or her doubt, then] that juror would *have to* articulate, give a reason or a rational[ ] explanation by pointing to items of evidence in the case or lack of evidence in the case.

Trial Tr. at 6347-48 (emphasis added). This instruction, as the district court observed, "represents a variation on the instructions upheld in prior caselaw; however, the variation is slight . . . ." Order of May 31, 2001, at 7. Fluellen argues principally that this variation, far from being "slight," crosses the constitutional line. We disagree.

The Supreme Court has made clear that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). Our inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

In only one case has the Supreme Court found a reasonable-doubt instruction to be unconstitutional. In *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*), a state court instructed the

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reasonable doubt instruction does not run afoul of the Due Process Clause whether reviewed *de novo* or with AEDPA deference.

jury in a murder trial that a reasonable doubt "must be such doubt as would give rise to a grave uncertainty . . . . It is an actual substantial doubt," *id.* at 40 (quoting *State v. Cage*, 554 So.2d 39, 41 (La. 1989)) (emphasis deleted). The Court said that "[i]t is plain . . . that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Id.* at 41. By contrast, in *Victor v. Nebraska*, 511 U.S. 1 (1994), the Supreme Court upheld two instructions arguably similar to the one found to be defective in *Cage*, *id.* at 6. Both instructions included phrases deemed to be problematic in *Cage*, such as "a substantial doubt" and "proof to a moral certainty." But the Court concluded that, evaluated as a whole, "[t]here [wa]s no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution." *Victor*, 511 U.S. at 22-23.

In *Holland v. United States*, 348 U.S. 121 (1954), the Court defined a reasonable doubt as a "doubt that would make a person hesitate to act," *id.* at 140. While we have said that "[w]e view this definition as the preferable way of expressing the notion of reasonable doubt," *Perez v. Irwin*, 963 F.2d 499, 502 (2d Cir. 1992), it has been heavily criticized, *see, e.g.*, *Victor*, 511 U.S. at 24-25 (Ginsburg, J., concurring in part and concurring in the judgment) (reiterating critiques of the "hesitate to act" formulation); *see also* Jon O. Newman, Beyond "Reasonable Doubt", 68 N.Y.U. L. Rev. 979, 983, 991 (1993). Because "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Holland*, 348 U.S. at 140 (internal quotation marks omitted), the Court has said that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so," *Victor*, 511 U.S. at 5; nor, if a trial court elects to explain reasonable doubt, does the Constitution demand that "any particular form of words be used in advising the jury of the government's burden," *id.*

It prohibits only those reasonable-doubt instructions that effectively shift the burden of proof or suggest a higher quantum of doubt than is required for an acquittal. *See id.* at 13-17, 19-23.

Fluellen avers that the state court's instruction shifted the burden of proof to him to establish his innocence because the jurors, perhaps apprehensive that a fellow juror would demand that they explain the reason for their doubt, "were in fact left to look to each other or the defendant for a reason to acquit." Appellant's Br. at 11. He notes that in several of our decisions, we have disapproved instructions implying that "jurors should be ready to give a reason for their doubts." *Chalmers*, 73 F.3d at 1268 (citing *United States v. Davis*, 328 F.2d 864, 867-68 (2d Cir. 1964) (Friendly, J.) (noting that such instructions "might intimidate a juror") (internal quotation marks omitted)). In *Chalmers*, we said that "[t]he danger in such an instruction is that a jury will take it to mean that they must be ready to articulate a reason for their doubts," and this may cause jurors to "look to the defendant to articulate the reason for the doubt, in essence requiring him to prove his innocence." 73 F.3d at 1268. In *Vargas*, we implied that it may be unconstitutional to suggest "that a juror *will* be called upon to articulate his doubts, or that he *must* articulate them if so called upon." 86 F.3d at 1278 (emphasis in original). We reasoned, first, that some doubts may be reasonable, but not articulable, *id.*, and it would run afoul of the Due Process Clause to prohibit a jury from acquitting on the basis of such doubts, *see id.*; and second, that some jurors may, consciously or not, "look to the defendant to supply an articulable reason for doubt before voting to acquit," *id.*

But in neither *Davis* nor *Chalmers* nor *Vargas* did we find the challenged reasonable-doubt instructions, considered as a whole, to be unconstitutional. *See Vargas*, 86 F.3d at 1277-78 (holding that the objectionable language, considered in the context of the entire reasonable-doubt instruction, did not run

afoul of the Due Process Clause); *Chalmers*, 73 F.3d at 1268 (concluding that the instruction as a whole made clear to the jury that the burden of proof remains at all times with the prosecution); *Davis*, 328 F.2d at 868 (holding that a definition of reasonable doubt instructing jurors that they should be able to give reasons for their doubts, while "perhaps unwise" and "not approved," was "not erroneous").

We conclude similarly here. While we do not countenance the particular instructions at issue, we cannot say that, "viewed in the context of the overall charge," *Cupp*, 414 U.S. at 147, "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380).

The passage challenged by Fluellen occupies no more than a page in a jury charge of more than 130 transcribed pages. Surrounding passages leave no doubt that the defendant must be presumed to be innocent and that the burden of proof rests with the prosecution throughout the trial. For example, the trial court emphasized that "[t]he only way that the presumption of innocence can be destroyed is by all of [the jurors] agreeing on the basis of the evidence that the defendant is guilty beyond a reasonable doubt," Trial Tr. at 6345; and that "the burden of overcoming that presumption . . . never shifts to the defense," *id.* at 6346. And the charge, far from raising the quantum of doubt, made clear that "reasonable" means "based on the evidence," not "fanciful" or "conjectural." *Id.* at 6348. Such an instruction is appropriate. *See Victor*, 511 U.S. at 19-20.

Fluellen further argues that the trial court's use of the phrase "moral certainty" in explaining circumstantial evidence tainted its reasonable-doubt instruction. To the extent that Fluellen urges this as an independent basis for habeas relief, we note that it has been procedurally defaulted, *see Bossett v. Walker*, 41 F.3d 825, 828-29 (2d. Cir. 1994), and raises issues

beyond the scope of the certificate of appealability, which this Circuit construes strictly, *see Smaldone v. Senkowski*, 273 F.3d 133, 139 (2d Cir. 2001). To the extent that Fluellen argues that we must evaluate the "moral certainty" language to determine its effect on the trial court's reasonable-doubt instruction, it does not change our conclusion that the instruction, "taken as a whole, . . . correctly conveyed the concept of reasonable doubt to the jury." *Holland*, 348 U.S. at 140.

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ Lucille Carr
By:

6/28/02
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE FLUELLEN,

Petitioner,

-against-

97-CIV-3189 (KMW) (AJP)

ORDER

HANS G. WALKER,
Superintendent,

Respondent.

WOOD, U.S.D.J.:

Pro se petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his state court conviction for conspiracy, murder, burglary, and weapons possession. In a Report and Recommendation ("Report") dated May 25, 2000, Magistrate Judge Andrew J. Peck recommended that the Court deny the petition. On or about June 5, 2000, respondent filed objections to the Report. On or about July 6, 2000, petitioner filed objections to the Report. For the reasons set forth below, the Court adopts Magistrate Judge Peck's recommendation to deny the petition.

I. Discussion

Petitioner raises two grounds for habeas relief: (1) that the trial court's reasonable doubt jury instruction was unconstitutional; and (2) that appellate counsel provided ineffective assistance of counsel because appellate counsel failed to argue that trial counsel was ineffective for not objecting to the reasonable doubt charge at trial.

A. Ground One: Adequacy of Jury Instruction on Reasonable Doubt

Petitioner claims that the trial court's reasonable doubt jury instruction deprived him of a fair trial. In the instruction, the trial judge defined reasonable doubt as a doubt for which the jurors "are able to give a reason or a rationale [sic] explanation which is based upon [their] evaluation of the evidence or lack of evidence in the case." *See* Supplemental Appendix in Support of Answer Opposing Petition for a Writ of Habeas Corpus, Exh. 10, Justice Carey's Jury Charge ("Charge") at 6347:17-20. The trial judge's instruction then went on to state:

> Now let's assume that you are sitting around the jury-room and let's assume a particular juror says I have a doubt. Then in other words, let's say that Ms. Ortiz can turn to that juror and say well, what is that a doubt about. And that juror would be expected to say, I have a doubt as to this defendant's guilt or this defendant's guilt or this defendant's guilt. And she can then say well, what is the reason for your doubt. *And that juror would have to articulate, give a reason or a rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case.*
>
> All right, so the person could say Mr. Corralo could say, I have a doubt because of this in the evidence or that in the evidence. Or I believe the evidence does not satisfy this or that with respect to the case. All right so that would be a reasonable doubt.

See Charge 6347:21-6348:14 (emphasis added).

Petitioner argues that this instruction both lessened the prosecutor's burden of proof and shifted the burden from the prosecution to the defense.

1. Procedural Default

In its memorandum of law in support of its answer, respondent argues that petitioner's claim is barred from federal review on the merits, because the state appeals court rejected petitioner's claim on state procedural grounds. *See* Respondent's Memorandum of Law in Support of Answer Opposing Petition for a Writ of Habeas corpus, dated Apr. 2, 1999, at 7 n*; *Rosenfeld v. Dunham*, 820 F.2d 52, 54 (2d Cir. 1987) (citations omitted) (holding that a federal court may not review the merits of a habeas petition where the state appellate court dismissed the claim on account of petitioner's failure to preserve his claim). The Report, on the other hand, concludes that the claim is not barred from federal review on the merits because the state court was not sufficiently clear that it had decided the case on state procedural grounds to bar such review of the claim.

The state appeals court stated that it had reviewed petitioner's arguments and found them "to be *either* unpreserved *or* without merit." *People v. Fluellen*, 194 A.D.2d 486, 599 N.Y.S.2d 574, 575 (1st Dep't 1993) (emphasis added). The Court agrees with the Report's conclusion that this statement is not sufficiently clear to warrant a finding by the Court that the state court dismissed the case on a state procedural ground.[1] Therefore, the Court adopts the Report's recom-

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[1] The court notes that a debate exists among district courts in the Second Circuit over whether a state court statement that a claim was either "unpreserved or without merit" provides a sufficient basis to bar federal review on the merits.

In its objection, respondent argues that the state appeals court's summary dismissal of petitioner's claim should be understood as a rejection on state procedural grounds, which would bar federal review on the merits. Respondent relies upon caselaw that holds that a petitioner's claim can be dismissed, as procedurally defaulted, when the state appeals court issues an opinion that states that the claims before it are either unpreserved or without merit. *See Hayes v. Coombe*, 1996 WL 650728 at *4 (S.D.N.Y. Nov. 7, 1996); *Meatley v. Artuz*, 886 F. Supp. 1009, 1016

mendation, over the respondent's objections, that the Court review petitioner's claim on the merits.

2. Due Process Requirement That Every Element of a Crime Be Proven Beyond a Reasonable Doubt

Petitioner challenges the state court's instruction to the jurors that if called upon by a fellow juror that they *would have to* articulate a reason or explanation for their doubt. The Report concludes that this instruction, when viewed in the light of the charge as a whole, is consistent with

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(E.D.N.Y. 1995); *Beverly v. Walker*, 899 F. Supp. 900, 907 (N.D.N.Y. 1995). Respondent also points to an Order by Judge Loretta Preska adopting a Report and Recommendation that held that petitioner's co-defendant's habeas claim was procedurally defaulted because the state appeals court had found that the claim was "largely unpreserved and without merit." *Ford v. Portuondo*, 97 Civ. 3312 (LAP) (SFG) (Apr. 17, 2000).

In contrast, the Report relies on a line of cases that hold that a federal court cannot deny review of a habeas claim based on procedural default unless the state court stated clearly and expressly that the state judgment rested on a state procedural bar. *See Avincola v. Stinson*, 60 F. Supp. 2d 133, 153 n.7 (S.D.N.Y. 1999); *McLean v. McGinnis*, 29 F. Supp. 2d 83, 92 (E.D.N.Y. 1998). The Report finds that the state appeals court statement that the case was dismissed because the claims were unpreserved or without merit is "ambiguous" as to whether the state court decision rested on procedural grounds and therefore holds that petitioner's claim is not procedurally defaulted.

The Court finds the Report's reasoning persuasive. The court notes that there is no controlling Second Circuit law on point. The Second Circuit has acknowledged the existence of this dispute, yet has not decided the issue. In *Hayes v. Coombe*, 142 F.3d 517, 519 (2d Cir. 1998), the Second Circuit considered a state court holding that a defendant's claims were "either unpreserved or without merit." The Court stated, "[w]hether this language in a state court's affirmance is too ambiguous to preclude federal court review on the independent ground of procedural default has yet to be determined by this circuit." *Id.* The Court then went on to decide the case on other grounds, holding that the petitioner's claim was patently devoid of merit" and that the Court did not need to decide the issue of default. *See id.*

well-established caselaw that holds that such an instruction does not constitute a due process violation. Petitioner argues that the trial court's instruction differs significantly from the instructions reviewed in prior caselaw and that the caselaw cited in the Report does not control the decision in this case. The Court has reviewed the record *de novo* and agrees with the Report that the jury instruction did not violate clearly established federal law.

The Constitution requires the government to prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970); *Chalmers v. Mitchell*, 73 F.3d 1262, 1266 (2d Cir. 1996). A jury instruction that either shifts the burden of proof from the prosecution to the defense, or suggests that a jury must have a higher degree of doubt, is constitutionally defective. *See Vargas v. Keane*, 86 F.3d 1273, 1276 (2d Cir. 1996). Courts have upheld instructions that define reasonable doubt as: (a) doubt for which some good reason can be given, *see Chalmers*, 73 F.3d at 1268; (b) doubt for which the juror can give a reason if called upon by a fellow juror to do so, *see Vargas*, 86 F.3d at 1275; and (c) doubt that the juror ought to be able to communicate to others, *see Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir. 1997). Courts criticize such definitions as "unhelpful, unwise, or even erroneous" but still hold that such definitions do not render an instruction constitutionally deficient so long as there is a reasonable likelihood that the charge as a whole adequately informs the jury that the Government must prove every element of a crime beyond a reasonable doubt. *See, e.g.*, *Vargas*, 86 F.3d at 1277 (citing *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400-01 (1973); *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239 (1994)); *United States v. Davis*, 328 F.2d 864, 867-68 (2d Cir. 1964).

The Court concludes that the instruction at issue in this case, which stated that jurors *must* articulate the basis for their doubts if called upon to do so, represents a variation on the instructions upheld in prior caselaw; however, the variation is slight and does not provide a valid basis for habeas relief. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), limits the Court's ability to grant habeas relief to cases where the state court decision was either: (a) contrary to, or (b) involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, *See Williams v. Taylor*, 562 U.S. 362, 399, 120 S. Ct. 1495, 1516 (2000). The "contrary to" prong applies when: (a) the state court arrives at a conclusion opposite to that reached by the Supreme court on a question of law; or (b) the state court confronts facts that are materially indistinguishable from facts that underlie relevant Supreme court precedent and arrives at an opposite result. *See id.* at 1519; *Lurie v. Wittner*, 228 F.3d 113, 127 (2d Cir. 2000). Because the Supreme Court has never concluded that jurors may not be required to provide other jurors with an explanation for their reasonable doubt and has never issued an opinion involving such an instruction, petitioner is not entitled to relief under the "contrary to" prong.

In order to issue a writ based on the "unreasonable application" prong, the court must conclude that the state court decision involved an erroneous and unreasonable application of clearly established federal law. *See Williams*, 529 U.S. at 410. In this case, petitioner argues that his position is supported by the established law that the prosecution must prove its case beyond a reasonable doubt and that this burden of proof rests with the prosecution. *See In re Winship*, 397 U.S. 358. However, this clearly established law does not control petitioner's claim. Given that the Supreme court has never indicated either in a holding or in dictum that it would be unconstitutional to instruct jurors that, if asked by another juror, a juror would have to articulate the reasons for his or

her doubt, this court can not conclude that the instruction represents an unreasonable application of Supreme Court law on reasonable doubt.[2]

B. Ground Two: Ineffective Assistance of Counsel

Petitioner also seeks a writ of habeas corpus based on a claim of ineffective assistance of counsel. Petitioner argues that appellate counsel deprived him of effective assistance of counsel by failing to argue on appeal that the trial attorney was ineffective. In order to find ineffective assistance of counsel, the Court must conclude: (1) that counsel's performance was constitutionally deficient, and (2) that counsel's performance caused prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The Court has reviewed petitioner's claim *de novo* and agrees with the Report's conclusion that petitioner fails to raise a valid claim of ineffective assistance of counsel.

Petitioner asserts that trial counsel failed to object to the reasonable doubt instruction, which he contends was in "clear violation of federal and state law," and that appellate counsel should have raised this issue on appeal. Contrary to petitioner's assertion, this Court concludes that the instruction was not in clear violation of federal and state law at the time of petitioner's trial, given that no caselaw existed at the time to the effect that an instruction similar to that given in petitioner's case violated the due process requirement. Therefore, the Court adopts the Report's recommendation to deny relief on the ground of ineffective assistance of counsel.

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[2] The Court declines to adopt the Report's conclusion that the challenged instruction is constitutionally permissible. The Court does not reach this issue, because, as explained, the instruction does not represent a violation of clearly established federal law, as required for habeas relief.

C. Certificate of Appealability

The Court adopts the Report's recommendation to grant a certificate of appealability. AEDPA sets forth that a certificate of appealability should issue "if the applicant has made a substantial showing of a denial of a constitutional right." *See* 28 U.S.C. 2253(c)(2). "The Supreme Court has held that a 'substantial showing' does not compel a petitioner to demonstrate that he would prevail on the merits, but merely that the issues involved in his case 'are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" *Lucidore v. New York State Division of Parole*, 209 F.3d 107, 112 (2d Cir. 2000) (citation omitted).

Reasonable jurists might disagree over whether the instruction given in this case represents an unreasonable application of clearly established federal law. The Second Circuit has indicated in dicta that such an instruction may violate due process. In two decisions, the Circuit Court has analyzed particular jury instructions by contrasting them with an instruction such as the one that petitioner challenges, stating that an instruction such as the one that petitioner challenges would be problematic. In *Vargas*, in explaining why a particular instruction was constitutional, the Second Circuit stated, "The challenged language does not suggest . . , that a juror *will* be called upon to articulate his doubts, or that he *must* articulate them if called upon to do so." 86 F.3d at 1279. Similarly, in *Chalmers*, in explaining its disapproval of a particular instruction, the Second Circuit stated, "The danger in such an instruction is that a jury will take it to mean that they must be ready to articulate a reason for their doubts." 73 F.3d at 1268. The Court also notes that the New York Court of Appeals has held that an instruction that imposes an affirmative obligation on jurors to articulate the basis for their

doubts violates due process. *See People v. Antommarchi*, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992). Therefore, the Court grants a certificate of appealability for appellate review of this issue.

II. Conclusion

For the reasons stated above, the Court denies petitioner's motion for a writ of habeas corpus. The Court grants a certificate of appealability.

SO ORDERED

Dated: New York, New York
May 31, 2001

/s/ Kimba M. Wood

Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to *pro se* petitioner and to counsel for respondent.

Supreme Court, U.S.
FILED

021164 JAN 27 2003

OFFICE OF THE CLERK

In the
Supreme Court of the United States

GEORGE FLUELLEN,

Petitioner,

vs.

HANS G. WALKER, Superintendent,
Auburn, C.F.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

MARVIN B. SEGAL
Counsel of Record
59 Maiden Lane
New York, New York 10038
(212) 972-1000

JOHN W. MITCHELL
Counsel of Record
600 Third Avenue
New York, New York 10016
(212) 696-9500

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE FLUELLEN,

Petitioner,

-against-

HANS G. WALKER,
Superintendent,

Respondent.

97 Civ. 3189 (KMW)(AJP)

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Kimba M. Wood, United States District Judge:

Pro se petitioner George Fluellen seeks a writ of habeas corpus from his conviction of conspiracy, murder, burglary and criminal possession of a weapon, alleging: (1) that the trial court's reasonable doubt charge was erroneous (Pet. ¶ 12(A)); and (2) ineffective assistance of appellate counsel for failing to argue that trial counsel was ineffective for not objecting to the reasonable doubt charge (Pet. ¶ 12(B)).

For the reasons set forth below, Fluellen's petition should be denied.

FACTS

On March 1, 1989, petitioner George Fluellen was indicted for conspiracy to distribute heroin, intentional and felony murder, burglary and criminal weapons possession. (Ex. 1:[1] Indictment; Ex. 3: Fluellen 1st Dep't Br. at 2.) Specifically, the indictment charged that beginning in August 1987, Fluellen and others conspired to package and distribute heroin with the brand name "Top Gun" in East Harlem, that Fluellen controlled and directed the East Harlem operation as part of a larger drug enterprise, and that on the afternoon of August 15, 1988, Fluellen strangled and shot Valentino Plaza-Colon in the head. (Ex. 1: Indictment; *see also* Affidavit of ADA Donald Siewert, dated 11/17/97, ¶¶ 5-7.)

On November 14, 1989, the jury trial of Fluellen and two codefendants began in New York State Supreme Court, New York County. (Siewert Aff. ¶ 8.) "In a two-month trial which produced a record approaching 6500 pages, the jurors heard sixty-nine witnesses and examined more than 200 exhibits." (*Id.*)

The Trial Court's Jury Instructions Regarding Burden of Proof and Reasonable Doubt

At the beginning of jury selection, the court told the potential jurors that, if selected, they would be called upon to decide whether the evidence at trial "establishes the guilt of the defendants beyond a reasonable doubt." (Ex. 8: Preliminary Instructions to the Venire at 79-81.) The court further told the venire members that Fluellen and his co-defendants "are presumed to be innocent and that presumption of innocence remains with them throughout the trial unless and until their guilt has been established to your satisfaction, only to your satisfaction, you the jury, beyond a reasonable doubt." (*Id.* at 98.) The trial judge also made clear that "the burden of removing that cloak of innocence, the burden of proving the

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[1] References to exhibits are to the exhibits in the State's Appendices.

defendants' guilt beyond a reasonable doubt remains with the prosecution" and "[n]o defendant is ever required to prove his or her innocence." (*Id.* at 99.)

The court restated these principles in preliminary instructions at the beginning of trial when it reminded the jurors that it was their job to make "the ultimate decision" of "whether the prosecution has proven guilt beyond a reasonable doubt" (Ex. 9: Preliminary Instructions to the Petit Jury at 236) and that "the burden of proof is with the prosecution" and "[t]he defense is not required to prove anything" (*id.* at 222; *see also id.* at 226).

In its final jury charge at the conclusion of trial, the court began by reminding the jurors, as he had instructed them at the beginning of the trial, that Fluellen and his co-defendants were "each presumed to be innocent" and that "that presumption remains with each of them throughout the trial unless and until that person's guilt has been established beyond a reasonable doubt." (Ex. 10: Charge at 6345.) The judge further instructed:

> Indeed, the presumption of innocence exists now at this very moment. It will continue to exist throughout my charge to you. And *you carry that presumption of innocence with you into the juryroom. The only way that the presumption of innocence can be destroyed is by all of you agreeing on the basis of the evidence that the defendant is guilty beyond a reasonable doubt*. Then at that point in time if and when you reach that decision then the presumption is over.
>
> You must start by saying that the defendant is presumed innocent. And only if the evidence which you accept and you believe convinces you beyond a reasonable doubt that the presumption must be discarded and a verdict of guilty returned, only then is the presumption destroyed.

> *The burden of overcoming that presumption of innocence, that shroud of innocence remains upon the prosecution throughout the trial. And it never shifts to the defense. The defendant is never required to prove his innocence.* And each and every element of the crimes that will be submitted to you as I will define those elements must be proven by the prosecution beyond a reasonable doubt.
>
> If you find that the People's burden is fulfilled, then and only then must you find the defendant guilty of the charges. If the People fail in their burden you must acquit the defendant and find him not guilty.

(*Id.* at 6345-46, emphasis added.)

In explaining reasonable doubt to the jury, the trial court defined a reasonable doubt as a doubt for which "you are able to give a reason or a rationale [sic] explanation which is based upon your evaluation of the evidence or lack of evidence in the case." (*Id.* at 6347.) The judge went on to postulate a discussion in which one deliberating juror challenged another to state a reason for his or her doubt:

> *Now let's assume that you are sitting around the jury-room and let's assume a particular juror says I have a doubt.* Then in other words, let's say that Ms. Ortiz can turn to that juror and say well, what is that a doubt about. And that juror would be expected to say, I have a doubt as to this defendant's guilt or this defendant's guilt or this defendant's guilt. *And she can then say well, what is the reason for your doubt.* And *that juror would have to articulate, give a reason or a rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case.*

> All right, so the person could say Mr. Corralo could say, I have a doubt because of this in the evidence or that in the evidence. Or I believe the evidence does not satisfy this or that with respect to the case. All right so that would be a reasonable doubt.
>
> Therefore jurors, it follows that if one doubt is [sic] that a defendant is guilty merely because of some hunch or a whim or speculation or a superstitious notion, then such a doubt is not a reasonable doubt since it is not based on the evidence or lack of evidence in the case. Nor is that kind of a doubt a rationale [sic] doubt.
>
> If one doubts that a defendant is guilty merely because of sympathy for him or because of a desire to avoid what might very well appear to be a very disagreeable task, then that type of doubt is not a reasonable doubt because it is not based on the evidence or lack of evidence in the case.

(*Id.* at 6347-49, emphasis added.)

The court further explained that:

> [I]f you the jury determine that there exists a doubt as to the guilt of the defendant which arises because of the evidence or lack of evidence in the case or insufficiency of evidence and for which you can give a reasonable doubt, reason or a rationale [sic] explanation; then such a doubt is a reasonable doubt. And because the People have not proven guilt you must find the defendant not guilty.

(*Id.* at 6350.) Defense counsel did not object to the court's reasonable doubt charge. (*See id.* at 6473-83.) The court went on to charge the jury as to the elements of each crime with which Fluellen and his co-defendants were charged, reminding the jurors that the prosecution was required to prove

beyond a reasonable doubt the defendants' identity, their accomplice liability, and each element of every offense. (*Id.* at 6365-468.)

Verdict and Sentence

The jury found Fluellen guilty as charged and Fluellen was sentenced to concurrent terms of 8 to 24 years on the conspiracy counts, to be served consecutively to 22 years to life imprisonment on the murder counts. (Ex. 3: Fluellen First Dep't Br. at 46-48.) *See People* v. *Fluellen*, 194 A.D.2d 486, 486, 599 N.Y.S.2d 574, 575 (1st Dept 1993).

Direct State Appeal

Fluellen appealed to the First Department and was assigned counsel. (*See* Siewert Aff. ¶ 10; Ex. 3: Fluellen 1st Dept Br. at 68.) In a sixty-eight page brief, Fluellen's attorney argued that: (1) the trial court should have granted Fluellen a mistrial after the prosecutor elicited testimony from a prosecution witness suggesting that Fluellen's relative had tried to intimidate the witness while the witness testified at trial (Ex. 3: Fluellen 1st Dep't Br. at 49-56); (2) Fluellen's guilt was not proved beyond a reasonable doubt, in particular because the prosecution had relied on insufficiently corroborated accomplice witnesses and because virtually all of the prosecution's witnesses had received "money and other inducements" from the prosecutor (*Id.* at 57-62); and (3) Fluellen's consecutive sentences were illegal and his overall sentence was excessive (*id.* at 63-67).

In a twenty-one page supplemental pro se brief, Fluellen argued that the trial judge: had improperly admitted racially inflammatory evidence against him (Ex. 4: Fluellen Supp. Pro Se 1st Dep't Br. at 2-8), unfairly marshaled the evidence (*id.* at 9-15), and improperly instructed the jury on reasonable doubt (*id.* at 16-20).

On June 29, 1993, the First Department affirmed Fluellen's conviction. *People* v. *Fluellen*, 194 A.D.2d 486, 599 N.Y.S.2d 574 (1st Dep't 1993). The First Department held that: the prosecution had "overwhelmingly" established Fluellen's guilt, that the trial court had properly denied Fluellen a mistrial based on the witness-intimidation claim, and that Fluellen's sentence was proper. *Id.* at 486, 599 N.Y.S.2d at 575. The First Department also stated that it had reviewed Fluellen's other arguments, "including those raised in the supplemental pro se brief," and found "them to be either unpreserved or without merit." *Id.* at 486-87, 599 N.Y.S.2d at 575.

Fluellen's counsel applied for leave to appeal to the New York Court of Appeals. In a supplemental pro se application, Fluellen drew the Court of Appeals' attention to the issues raised in his supplemental pro se brief to the First Department including his argument challenging the trial court's reasonable doubt instructions. (Ex. 5: Fluellen Supp. Pro Se Leave to Appeal Letter.) The New York Court of Appeals denied leave to appeal on December 15, 1993, and again on March 7, 1994. *People* v. *Fluellen*, 82 N.Y.2d 894, 610 N.Y.S.2d 161 (1993), & 83 N.Y.2d 852, 612 N.Y.S.2d 384 (1994).

State Collateral Proceedings

On July 9, 1991, Fluellen moved to vacate his conviction pursuant to CPL § 440.10 based on newly discovered evidence as to money allegedly given by the State to a prosecution witness. (Ex. 6: Fluellen CPL § 440.10 Motion Papers.) On May 27, 1992, the trial court denied Fluellen's CPL § 440.10 motion. (Ex. 6: 5/27/92 Opinion.) On September 17, 1992, the First Department denied leave to appeal. (Ex. 6: Certificate Denying Leave.)

On April 9, 1997, Fluellen moved the First Department for a writ of error coram nobis, alleging that he had been denied effective assistance of appellate counsel. (Ex. 7: Fluellen

Coram Nobis Papers.) Fluellen asserted that his appellate attorney had improperly failed to argue that trial counsel had provided ineffective assistance. trial. (Ex. 7: Fluellen Coram Nobis Aff. ¶¶ 12-28.) Fluellen contended that portions of the trial court's reasonable doubt charge would have constituted reversible error had his attorney objected to them, and that appellate counsel should have argued that trial counsel was ineffective in failing to so object. (*Id.* ¶¶ 19-22, 27-28.)

On August 7, 1997, the First Department denied Fluellen's coram nobis motion. *People* v. *Fluellen*, 242 A.D.2d 408, 661 N.Y.S.2d 689 (1st Dep't 1997). (*See also* Ex. 7, last page: 8/7/97 1st Dep't Order.)

Fluellen's Federal Habeas Petition

Fluellen's present federal habeas petition is dated April 14, 1997 and was received by the Court's Pro Se Office on April 21, 1997. (Dkt. No. 1: Pet. at 2, 7.) The petition raises two habeas grounds: (1) the trial court's reasonable doubt jury instruction was erroneous (Pet. ¶ 12(A)); and (2) ineffective assistance of appellate counsel for failing to argue that trial counsel was ineffective for not objecting to the reasonable doubt charge. (Pet. ¶ 12(B)).

On May 21, 1997 and June 11, 1997, before the First Department had ruled on Fluellen's ineffective assistance of appellate counsel motion, this Court issued a Report and Recommendation to dismiss Fluellen's petition as a "mixed" petition containing both exhausted and unexhausted claims (Dkt. Nos. 3, 5); Judge Wood affirmed on that ground on September 7, 1997 (Dkt. No. 8). *See Fluellen* v. *Walker*, 975 F. Supp. 565 (S.D.N.Y. 1997) (Wood, D.J. & Peck, M.J.).

On October 3, 1997, after Fluellen notified the Court that the First Department had denied his coram nobis petition, Judge Wood allowed Fluellen to resubmit his habeas petition. (Dkt. No. 9: 10/3/97 Order.) On November 17, 1997, the State moved to dismiss the petition as untimely under the Second

Circuit's *Peterson* v. *Demskie*, 107 F.3d 92 (2d Cir. 1997), interpretation of the statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (Dkt. Nos. 12-13.) Judge Wood denied the motion on March 2, 1999 based on the Second Circuit's decision in *Ross* v. *Artuz*, 150 F.3d 97 (2d Cir. 1998). (Dkt. No. 16: 2/26/99 Order.)

The State answered the Petition on April 2, 1999. (Dkt. Nos. 17-18.) On February 22, 2000, Judge Wood referred Fluellen's petition to me for a Report and Recommendation. (Dkt. No. 22.)

ANALYSIS

I. THE TRIAL COURT'S REASONABLE DOUBT JURY INSTRUCTION WAS PROPER

Fluellen argues that the trial court erred in delivering a reasonable doubt charge which included instructions to the jurors that, if called upon by their fellow jurors to explain their doubts as to Fluellen and his co-defendants' guilt, they "would have to articulate, give a reason or rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Pet. ¶ 12(A); *see also* Fluellen Br. at 1-29.)

A. The Court Cannot Say That The First Department's Decision Rests On An Independent State Ground of Procedural Default

Fluellen raised the jury instruction claim in his supplemental pro se brief to the First Department (Ex. 4: Fluellen Supp. Pro Se 1st Dep't Br. at 16-20.) In response, the State argued both that the claim was unpreserved because defense counsel had not objected to the instruction and that the instruction was proper. (Ex. 2: State 1st Dept Br. at 74-77.) The First Department, after specifically addressing other claims, stated that "[w]e have reviewed defendant's additional arguments including those raised in the supplemental pro se brief

and find them to be either unpreserved or without merit." *People* v. *Fluellen*, 194 A.D.2d 486, 486, 599 N.Y.S.2d 574, 575 (1st Dep't 1993). The State now argues that "[t]he natural inference from this summary dismissal of an unpreserved claim is that the Appellate Division rejected [Fluellen's jury instruction claim] on state procedural grounds, barring the claim from habeas corpus review." (State Br. at 7 n.*.)

It is well-established that "[w[hen a state appellate court affirms a conviction with an opinion, [a federal court] cannot assume that the decision rested on a procedural default. Indeed, in order to preclude federal review, the last state court to render judgment must clearly and expressly state[ ] that its judgment rest[ed] on a state procedural bar.'" *Jones* v. *Vacco*, 126 F.3d 408, 415 (2d Cir. 1997) (citations omitted); *accord*, *Estrada* v. *Senkowski*, 98 Civ. 7796, 1999 WL 1051107 at *10 (S.D.N.Y. Nov. 19, 1999) (Pauley, D.J. & Peck, M.J.); *see also*, *e.g.*, *Avincola* v. *Stinson*, 97 Civ. 1132, 1999 WL 557965 at *17 n. 7 (S.D.N.Y. July 9, 1999) (Scheindlin, D.J. & Peck, M.J.). The First Department's decision here can only be described as "facially ambiguous." *Hayes* v. *Coombe*, 142 F.3d 517, 519 (2d Cir. 1998), *cert. denied*, 525 U.S. 1108, 119 S. Ct. 879 (1999); *accord*, *Estrada* v. *Senkowski*, 1999 WL 1051107 at *10; *see also*, *e.g.*, *Avincola* v. *Stinson*, 1999 WL 557965 at *17 n. 7. Accordingly, since "[i]t is unclear whether the [First Department] rejected [Fluellen's jury instruction] claim because it was unpreserved or because it was deemed meritless as a matter of federal constitutional law," this Court will address the merits of the claim. *Tankleff* v. *Senkowski*, 135 F.3d 235, 247 (2d Cir. 1998); *accord*, *e.g.*, *Estrada* v. *Senkowski*, 1999 WL 1051107 at *10; *Avincola* v. *Stinson*, 1999 WL 557965 at *17 n. 7; *McLean* v. *McGinnis*, 29 F. Supp. 2d 83, 92 (E.D.N.Y. 1998).

B. Fluellen's Jury Instruction Claim Lacks Merit

Over 25 years ago, in 1973, the Supreme Court noted that it was already a "well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400 (1973); *accord, e.g., Gaines* v. *Kelly*, 202 F.3d 598, 605-10 (2d Cir. 2000); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d 347, 365 (S.D.N.Y. 1999) (Patterson, D.J. & Peck, M.J.); *Mason* v. *Shriver*, 14 F. Supp. 2d 321, 330 (S.D.N.Y. 1998) (Preska, D.J. & Peck, M.J.); *see also, e.g., Cage* v. *Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 329 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."); *United States* v. *Park*, 421 U.S. 658, 674, 95 S. Ct. 1903, 1912 (1975) (quoting *Cupp*).

In *Victor* v. *Nebraska*, 511 U.S. 1, 114 S. Ct. 1239 (1994), the Supreme Court noted that the beyond a reasonable doubt standard "is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* at 6, 114 S. Ct. at 1243. Since "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof," the instructions must "correctly conve[y] the concept of reasonable doubt" when "taken as a whole." *Id.*; *accord, e.g. Gaines* v. *Kelly*, 202 F.3d at 605; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 365.

Fluellen challenges the trial court's instruction that, if questioned by a fellow juror as to the reason for his or her doubt, "that juror would have to articulate, give a reason or a rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Ex: 10: Charge at 6347-48.) Fluellen argues that "in charging reasonable

doubt in this manner, [the trial court] less[ened] the People's burden of proof and shifted the burden of proof to the defendant." (Fluellen Br. at 4.)

The Second Circuit has held that a jury instruction that states or implies that jurors should be able to give a reason for their doubts "is 'not approved' and 'perhaps unwise,' but is 'not erroneous.'" *United States* v. *Davis*, 328 F.2d 864, 868 (2d Cir. 1964) (Friendly, C.J.); *accord, e.g.*, *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1268 (2d Cir.), *cert. denied*, 519 U.S. 834, 117 S. Ct. 106 (1996); *see also, e.g.*, *Pinto* v. *Stinson*, No. 96-2655, 129 F.3d 114 (table), 1997 WL 664866 at *1 (2d Cir. Oct. 21, 1997) ("While this Court has disapproved of [reasonable doubt jury instructions including the phrase a doubt for which you can give a substantial reason] it has not found such instructions to violate due process. . . . Likewise, the jury instructions given here, while problematic, did not unconstitutionally lower the State's burden of proof."), *cert. denied*, 522 U.S. 1131, 118 S. Ct. 1085 (1998); *Beverly* v. *Walker*, 118 F.3d 900, 903 (2d Cir. 1997), *cert. denied*, 522 U.S. 883, 118 S. Ct. 211 (1997); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 365-66; *Mason* v. *Schriver*, 14 F. Supp. 2d at 330. Indeed, New York State Courts have long approved of such language. *See, e.g., Vargas* v. *Keane*, 86 F.3d 1273, 1277 (2d Cir.), *cert. denied*, 519 U.S. 895, 117 S. Ct. 240 (1996); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366 & n.12 (citing cases); *Mason* v. *Schriver*, 14 F. Supp. 2d at 330-31 n.7 (citing cases); *see also* cases cited at page 24 below.

In analyzing an allegedly erroneous reasonable doubt jury charge, the Second Circuit has emphasized that a court must view the instruction in light of the charge as a whole to determine whether there has been a constitutional violation. *See, e.g.*, *Gaines* v. *Kelly*, 202 F.3d at 605-06; *Pinto* v. *Stinson*, 1997 WL 664866 at *1; *Beverly* v. *Walker*, 118 F.3d at 903-04 (upholding reasonable doubt instruction as a doubt that a juror is able to communicate if asked by a fellow juror,

in context of entire charge); *Vargas* v. *Keane*, 86 F.3d at 1277-78 (upholding jury instruction that defined reasonable doubt as "doubt for which you can give a reason," when viewed in light of the charge as a whole); *Chalmers* v. *Mitchell*, 73 F.3d at 1268; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366 (upholding similar charge); *Barber* v. *Scully*, 557 F. Supp. at 1296 (upholding similar charge); *Mason* v. *Shriver*, 14 F. Supp. 2d 321, 330-31. "[W]here the jury instructions taken as a whole clearly instruct that the burden is on the government and that the defendant is never required to prove his innocence, the charge as a whole will not be held to be erroneous." *Mason* v. *Schriver*, 14 F. Supp. 2d at 330 (citing *Vargas, Chalmers & Davis)*; *accord*, *Lugo* v. *Kuhlmann*, 68 F. Supp. at 366. The question is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution;" that is, "whether 'there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [In re] *Winship* standard'" of "'proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.'" *Gaines* v. *Kelly*, 202 F.3d at 602, 605, 606 (quoting Supreme Court opinions).

Here, the trial court's entire charge made clear that Fluellen was not required to prove his innocence and that the burden rested on the State. For example, the trial judge instructed the jurors that Fluellen and his co-defendants were "each presumed to be innocent" and that "that presumption remains with each of them throughout the trial unless and until that person's guilt has been established beyond a reasonable doubt." (Ex. 10: Charge at 6345.) The court further stated that "[t]he burden of overcoming that presumption of innocence . . . remains upon the prosecution throughout the trial," that that burden "never shifts to the defense," and that "[t]he defendant is not required to prove his innocence." (*Id.* at 6346.) These instructions were in addition to instructions both at the

beginning of jury selection, at the very beginning of trial and throughout the final jury charge which made clear that the prosecution bore the burden of proof. (*See, e.g.*, Ex. 8 at 98, 99; Ex. 9 at 222; Ex. 10 at 6367-68, 6396, 6402-03, 6418-19, 6420-21, 6430-34, 6435-39, 6441-58.)

In addition, immediately preceding the disputed language, the court defined a reasonable doubt as a doubt "based upon your evaluation of the evidence or lack of evidence in the case." (Ex. 10: Charge at 6347.) Immediately after the challenged language, the trial judge told the jury that, to be reasonable, a doubt must not be based on "some hunch or a whim or speculation or a superstitious notion." (*Id.* at 6348.) Thus, the instruction in its entirety fairly conveyed that "any doubt sufficient for acquittal must be based on a reasoned evaluation of the evidence or lack of evidence, rather than on speculation, emotion or whim." *Vargas* v. *Keane*, 86 F.3d at 1278.

Fluellen points out that in *Vargas* v. *Keane*, the Second Circuit, in rejecting the petitioner's constitutional challenge to jury instructions defining a reasonable doubt as a "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room," remarked that "[t]he challenged language does not suggest . . . that a juror will be called upon to articulate his doubts, or that he must articulate them if so called upon" *Vargas* v. *Keane*, 86 F.3d at 1278 (*See* Fluellen Br. at 19.) This observation, however, was not central to the *Vargas* court's holding. Rather, the Second Circuit explained in *Gaines* the two considerations that had led it to uphold the jury charge in *Vargas*:

> First, we found that the surrounding passages in the instruction directed the jury to ground their decisions in the evidence, such that the "reason" a juror would think herself expected to give would simply be a reason based in the evidence, and not one exceeding degree of doubt required for acquittal. . . . Second, we reasoned that the

> surrounding passages sufficiently emphasized the prosecution's burden of proof, such that the jurors were unlikely to understand the instruction as demanding that they look to each other or to the defendant to supply a reason to acquit.

Gaines v. *Kelly*, 202 F.3d at 609. This Court agrees with the State that "a charge that jurors have to give reasons for their doubts differs only slightly from a charge that jurors *must be able to give reasons* 'if called upon to do so by a fellow juror in the jury room' " and that "[t]he former charge carries no greater potential for minimizing the reasonable doubt standard or shifting the burden of proof." (State Br. at 13-14, emphasis in original.) Indeed, in *Mason* v. *Schriver*, this Court upheld a reasonable doubt charge that also involved a hypothetical discussion of one juror asking another for the reasons for the juror's doubt. *Mason* v. *Schriver*, 14 F. Supp. 2d at 330-31.[2]

Fluellen also draws the Court's attention to *People* v. *Antommarchi*, 80 N.Y.2d 247, 590 N.Y.S.2d 33 (1992), decided nearly three years after Fluellen's trial. (Fluellen Br. at 6-7.) There, the New York Court of Appeals upheld a charge defining reasonable doubt as "a doubt for which a juror can give a reason if he or she is called upon to do so in the jury

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[2] The charge in *Mason* included the following language:

> "*If when you retire to deliberate*, and you discuss this case, and discuss it you should, for the process of reaching a verdict involves discussion and the give and take of your recollections and opinions of the evidence, and *one of you says, I have a doubt about this aspect of the case and a fellow juror responds what is the reason for your doubt? If you can then give a reason based on the evidence or lack of evidence, that is a reasonable doubt.* If you can't, it is not a reasonable doubt."

Id. at 330 (emphasis added).

room" but held that the following instructions, given as part of an *Allen* charge,[3] "violated the Due Process Clauses of both the State and Federal Constitutions":

> You swore that, if you have a reasonable doubt, I repeat, a reasonable doubt, on any relative point or material element or on the evidence or lack of it, and when one or more of your fellow jurors questioned you about it, you would be willing and able to give him what you believe is a fair, calm explanation for your position based on the evidence or the lack of evidence in this particular case.

80 N.Y.2d at 251-52, 590 N.Y.S.2d at 35-36.

The *Antommarchi* court reasoned that "[t]he difference is between a charge which essentially defines the degree of clarity and coherence of thought necessary for the jurors to conclude they harbor a reasonable doubt and one which imposes an affirmative obligation on the juror to specifically articulate the basis for such doubt" *Id.* at 251, 590 N.Y.S.2d at 35-36. The New York Court of Appeals went on to explain as follows:

> [I]t is not surprising, nor improper, for a court to instruct the jury that a reasonable doubt is one for which a reason can be given, nor to augment that definition with an explanation that the doubt should be sufficiently clear so that the juror would be capable of giving a reason for his or her views. Indeed, it is difficult to envision how

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[3] "The term '*Allen* charge' is a generic term used for a type of supplemental instruction that is given to a deadlocked jury, first approved by the Supreme Court in *Allen* v. *United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). A traditional *Allen* charge reminds the jurors about the importance of obtaining a verdict and encourages jurors to listen 'to each other's arguments' while also emphasizing that 'the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows.'" *Smalls* v. *Batista*, 191 F.3d 272, 275 n.1 (2d Cir. 1999) (quoting *Allen*).

> jurors could follow the manifestly proper instructions of the court to listen to other jurors, give their views careful consideration, and reason together when considering the evidence if none of the individual jurors were able to express the reasons underlying their vote. Consequently, for over 100 years we have approved language defining a reasonable doubt as one which a juror could, if called upon to do so, express or articulate.
>
> The language used in the *Allen* charge, however, went beyond permissible bounds by placing on each juror the express duty of giving a 'fair, calm explanation for your position.' . . . An instruction that requires jurors to supply concrete reasons 'based upon the evidence' for their inclination to acquit implicitly imposes on defendants the burden of presenting a defense that supplies jurors with the arguments they need to legitimize their votes. As such, the charge actually reverses the constitutionally required principles that the defense bears no burden and that it is the prosecution that must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant's guilt.

Id. at 252, 590 N.Y.S.2d at 36 (citations omitted).

Antommarchi is a state decision, not controlling as to federal constitutional questions, and, moreover, is distinguishable. Both because of its forceful language and the *Allen* charge context in which it was delivered, the instruction held to be reversible error in *Antommarchi* was far more likely than the instructions at Fluellen's trial to leave jurors with the impression that the defendant bore "the burden of presenting a defense that supplies the jurors with the arguments they need to legitimize their votes." In *Antommarchi*, the trial court admonished a deadlocked jury that its members were duty bound by oath to "be willing and able to give . . . a fair, calm explanation for [their] position[s]." 80 N.Y.S.2d at 251, 590 N.Y.S.2d at 35. In contrast, the judge at Fluellen's trial,

as part of a lengthy jury charge containing repeated reminders that the burden of proof remained at all times with the prosecution and never shifted to the defense, presented the jurors with a hypothetical scenario in which one juror asks another to explain the reason for his or her doubt, and instructed the jurors that, in such a situation, the challenged juror "would have to articulate, give a reason or rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Ex. 10: Charge at 6347-48.) Taken in light of the entire jury instructions, the "challenged language [in Fluellen's charge] did not raise the quantum of doubt necessary for acquittal or shift the burden of proof away from the prosecution." *Vargas* v. *Keane*, 86 F.3d at 1277; *see also, e.g.*, *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366; *Mason* v. *Shriver*, 14 F. Supp.2d at 330-31. Accordingly, while this charge language is to be discouraged, the reasonable doubt charge here did not constitute constitutional error sufficient to justify habeas relief.

The Court's conclusion is further supported by the AEDPA's review standard, as explicated by the Supreme Court's recent decision in *Williams* v. *Taylor*, 120 S. Ct. 1495 (2000). Pursuant to the AEDPA,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1). The Supreme Court explained in *Williams* that:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. *Taylor*, 120 S. Ct. at 1523.

Here, Supreme Court precedent "does not require that any particular form of words be used in advising the jury of the government's burden of proof," so long as the instructions "correctly conve[y] the concept of reasonable doubt" when "taken as a whole." *Victor* v. *Nebraska*, 511 U.S. at 5, 114 S. Ct. at 1243. The First Department's decision clearly is not "contrary to" Supreme Court precedent. While not as clear, this Court cannot say that the First Department's decision involved an unreasonable application of Supreme Court precedent: it is the Second Circuit, not the Supreme Court, that has criticized as "unwise" and "not approved" jury

instructions that jurors should be able to give a reason for their doubts. While the charge in Fluellen's case is close to the wrong side of the line under Second Circuit precedent (see page 12 above), Supreme Court precedent has not addressed this issue. Thus, even if this Court were to find the challenged jury instructions here to be erroneous (as opposed to merely unwise) — which it does not — the Court would not be able to grant habeas relief under the AEDPA because the First Department's decision is neither contrary to nor involves an unreasonable application of Supreme Court precedent.

II. FLUELLEN'S APPELLATE COUNSEL WAS NOT INEFFECTIVE

Fluellen argues that appellate counsel deprived him of effective assistance by failing to argue on appeal that Fluellen's trial attorney was ineffective. (Pet. ¶ 12(A); Fluellen Br. at 30-39.) According to Fluellen, the trial court's reasonable doubt jury charge would have constituted reversible error had trial counsel objected, and therefore appellate counsel should have argued that trial counsel was ineffective in failing to object. (*Id.*)

A. The *Strickland* v. *Washington* Standard

The Supreme Court has announced a two-part test to determine if counsel's assistance was ineffective. *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. at 687, 104 S. Ct. at 2064. This performance is to be judged by an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689, 104 S. Ct. at 2065.[4]

Second, the defendant must show prejudice from counsel's performance. *Strickland* v. *Washington*, 466 U.S. at 687, 104 S. Ct. at 2064. The "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S. Ct. at 2068-69. Put another way, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.[5]

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[4] *Accord, e.g.*, *Dukes* v. *McGinnis*, 99 Civ. 9731, 2000 WL 382059 at *8 (S.D.N.Y. April 17, 2000) (Peck, M.J.); *Cruz* v. *Greiner*, 98 Civ. 7939, 1999 WL 1043861 at *16 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); *Lugo* v. *Kuhlmann* , 68 F. Supp. 2d 347, 370 (S.D.N.Y. 1999) (Patterson, D.J. & Perk, M.J.); *Santos* v. *Greiner*, 99 Civ. 1545, 1999 WL 756473 at *7 (S.D.N.Y. Sept. 24, 1999) (Peck, M.J.); *Franza* v. *Stinson*, 58 F. Supp. 2d 124, 133-34) (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.); *Torres* v. *Irvin*, 33 F. Supp. 2d 257, 277 (S.D.N.Y. 1998) (Cote, D.J. & Peck, M.J.).

[5] *See also, e.g.*, *DeLuca* v. *Lord*, 77 F.3d 578, 584 (2d Cir.), *cert. denied*, 519 U.S. 824, 1175. S. Ct. 83 (1996); *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Cruz* v. *Greiner*, 1999 WL 1043961 at *16; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 370-71; *Santos* v. *Greiner*, 1999 WL 756473

The Supreme Court has counseled that these principles "do not establish mechanical rules." *Strickland* v. *Washington*, 466 U.S. at 696, 104 S. Ct. at 2069. The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.* The Supreme Court also made clear that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697, 104 S. Ct. at 2069.[6]

In addition, the Supreme Court also has counseled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, 466 U.S. at 690-91, 104 S. Ct. at 2066.[7]

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at *7-8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277.

[6] *Accord, e.g.*, *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Cruz* v. *Greiner*, 1999 WL 1043961 at *16; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Santos* v. *Greiner*, 1999 WL 756473 at *8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277.

[7] *Accord, e.g.*, *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Santos* v. *Greiner*, 1999 WL 756473 at *8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *see also, e.g.*, *Engle* v. *Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575 (1982) ("We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."); *Jackson* v. *Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) ("In reviewing *Strickland* claims, courts are instructed to 'indulge a strong presumption

The *Strickland* test applies to appellate as well as trial counsel. *See, e.g., Mayo* v. *Henderson*, 13 F.3d at 533.[8] Appellate counsel is not required to raise every colorable claim urged by the client, but is entitled to focus on key issues while winnowing out weaker arguments. *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371-72.[9] Further, reviewing courts should not second guess the reasonable professional judgments of appellate counsel as to the most promising appeal issues. *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371-72.[10] Thus, a petitioner may establish constitutionally inadequate performance

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that counsel's conduct falls within the wide range of reasonable professional assistance' and that counsel's conduct was not the result of error but derived instead from trial strategy. We are also instructed, when reviewing decisions by counsel, not to 'second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every "colorable" claim' on appeal.") (citations omitted); *Mayo* v. *Henderson*, 13 F.3d 528, 533 (a reviewing court "may not use hindsight to second-guess [counsel's] strategy choices"), *cert. denied*, 513 U.S. 820, 115 S. Ct. 81 (1994).

[8] *See also, Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277; *Hurd* v. *Keane*, 97 Civ. 2991, 1997 WL 582825 at *2 (S.D.N.Y. Sept. 19, 1997); *Ehinger* v. *Miller*, 942 F. Supp. 925, 932 (S.D.N.Y. 1996) (Mukasey, D.J. & Peck, M.J.); *Benn* v. *Stinson*, 917 F. Supp. 202, 205 (S.D.N.Y. 1995) (Stein, D.J. & Peck, M.J.).

[9] *Accord, e.g., Jones* v. *Barnes*, 463 U.S. 745, 751-53, 103 S. Ct. 3308, 3312-13 (1983); *Jackson* v. *Leonardo*, 162 F.3d at *5; *Mayo* v. *Henderson*, 13 F.3d at 533; *Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Hurd* v. *Keane*, 1997 WL 582825 at *2; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

[10] *Accord, e.g., Jones* v. *Barnes*, 463 U.S. at 754, 103 S. Ct. at 3314; *Tsirizotakis* v. *LeFevre*, 736 F.2d 57, 65 (2d Cir.), *cert. denied*, 469 U.S. 869, 105 S. Ct. 216 (1984); *see also, e.g., Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Franza* v. *Stinson*, 58 Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

only by showing that appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo* v. *Henderson*, 13 F.3d at 533.[11]

B. Application of the *Strickland* Standard

As discussed above, the reasonable doubt jury instruction did not violate federal law. (*See* Point 1.1B above & cases cited therein.) As for state law, Fluellen has not cited, and this Court has not found, any New York cases decided prior to November-December 1989, the time of Fluellen's trial, suggesting the instruction was erroneous. Indeed, the prevailing New York decisional law at the time of Fluellen's trial indicated that the reasonable doubt charge was proper. *See, e.g.*, *People* v. *Malloy*, 55 N.Y.2d 296, 300 & n.2, 449 N.Y.S.2d 168, 169 & n.2 ("a doubt for which you can conscientiously express a reason"), *cert. denied*, 459 U.S. 847, 103 S. Ct. 104 (1982); *People* v. *Jones*, 27 N.Y.2d 222, 225-27, 316 N.Y.S.2d 617, 618-19 (1970) (reasonable doubt is one for which there is a "substantial" reason); *People* v. *Quinones*, 123 A.D.2d 793, 793, 507 N.Y.S.2d 417, 417 (2d Dep't 1986) (a reasonable doubt is a doubt for which a juror can give a reason if he is "called upon to do so in the jury room"); *People* v. *Lagroppo*, 90 A.D. 219, 231-32, 86 N.Y. 116, 126 (1st Dept 1903) (reasonable doubt is a doubt a "man of reasonable intelligence" could give a "good reason for entertaining if he is called upon to do so"), *aff'd*, 179 N.Y. 126 (1904). Therefore, viewed at the time of representation,

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[11] *See also, e.g.*, *Jackson* v. *Leonardo*, 162 F.3d at 85; *Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Lugo* v. *Kuhlman*, 68 F. Supp. 2d at 372; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Hurd* v. *Keane*, 1997 WL 582825 at *2; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

trial counsel's failure to object to the reasonable doubt instructions was not deficient.[12] Indeed, as noted above, even as of today the trial court's reasonable doubt charge is unwise but not erroneous.

Since Fluellen's trial counsel was not ineffective, appellate counsel cannot be faulted for choosing not to argue on appeal

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[12] Even assuming that, as Fluellen argues, *People* v. *Antommarchi*, 80 N.Y.2d 247, 251-52, 590 N.Y.S.2d 33, 35-36 (1992) (discussed in Point 1B above) suggests that the charge in Fluellen's case was erroneous, that case was decided nearly three years after Fluellen's trial, and is therefore irrelevant to an assessment of trial counsel's performance. *See, e.g.*, *Mayo* v. *Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, 'viewed at the time of counsel's conduct' . . . and may not use hindsight to second-guess his strategy choices. Counsel is not required to forecast changes in the governing law.") (citations omitted); *People* v. *Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of the particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."); *see also, e.g.*, *Jameson* v. *Coughlin*, 22 F.3d 427, 429 (2d Cir.) (quoting *Lilly* v. *Gilmore*, 988 F.2d 783, 786 (7th Cir.) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law . . . ."), *cert. denied*, 510 U.S. 852, 114 S.Ct. 154 (1993)), *cert. denied*, 513 U.S. 888, 115 S. Ct. 232 (1994); *Siefert* v. *Keane*, 74 F. Supp. 2d 199, 207 (E.D.N.Y. 1999) ("an attorney's performance must be evaluated in light of the prevailing legal practice at the time, without the benefit of hindsight"), *aff'd mem.*, 205 F.3d 1324 (2d Cir. 2000); *Dixon* v. *Miller*, 56 F. Supp. 2d 289, 299 E.D.N.Y. 1999); *Mingo* v. *Artuz*, 95 Civ. 1087, 1999 WL 301686 at *3 (E.D.N.Y. May 5, 1999); *Marino* v. *United States*, 97 Civ. 2107, 95 Cr. 116, 1998 WL 214877 at *5 (S.D.N.Y. April 28, 1998) ("A defendant is entitled to a competent lawyer, not an omniscient one."); *Marino* v. *United States*, 97 Civ. 1884, 89 Cr. 341, 1997 WL 714879 at *3 (S.D.N.Y. Nov. 17, 1997) ("Counsel's failure to predict a change in the law does not constitute a performance falling below objectively reasonable professional standards."); *People* v. *Flores*, 84 N.Y.2d 184, 188, 615 N.Y.S.2d 662, 664 (1994); *People* v. *Lane*, 93 A.D.2d 92, 97, 460 N.Y.S.2d 926, 931 (1st Dept 1983).

the ineffective assistance of trial counsel. *See, e.g., Dukes* v. *McGinnis*, 99 Civ. 9731, 2000 WL 382059 at *12 (S.D.N.Y. April 17, 2000) (Peck, M.J.)[13]

CONCLUSION

For the reasons set forth above, the Court should deny Fluellen's petition. However, because the trial court's reasonable doubt charge is close to the line under Second Circuit precedent, the Court should grant Fluellen a certificate of appealability limited to that claim. *See Slack* v. *McDaniel*, 120 S. Ct. 1595, 1599 (2000) (certificate of appealability should issue where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"); *Lucidore* v. *New York State Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further").

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the

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[13] *See also, e.g., Marel* v. *Lord*, 95 Civ. 9968, 1998 WL 17730 at *4 (S.D.N.Y. Jan. 16, 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999); *Ehinger* v. *Miller*, 942 F. Supp. 925, 928, 934 (S.D.N.Y. 1996) (Mukasey, D.J. & Peck, M.J.); *Bradford* v. *Keane*, CIV. A. No. CV-94-4665, 1996 WL 361593 at *20 (E.D.N.Y. June 3, 1996); *Adams* v. *People of the State of New York*, No. 95-CV-687, 1996 WL 345793 at *4 (E.D.N.Y. June 4, 1996); *Todd* v. *Berry*, 86 Civ. 9875, 1988 WL 103351 at *6 (S.D.N.Y. Sept. 27, 1988).

Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, 500 Pearl Street, Room 1610, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Wood. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas* v. *Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *IUE AFL-CIO Pension Fund* v. *Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, 513 U.S. 822, 115 S. Ct. 86 (1994); *Roldan* v. *Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank* v. *Johnson*, 968 F.2d 298, 300 (2d Cir.), *cert. denied*, 506 U.S. 1038, 113 S. Ct. 825 (1992); *Small* v. *Secretary of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *Wesolek* v. *Canadair, Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy* v. *Manson*, 714 F.2d, 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
May 25, 2000

Respectfully submitted,

/s/ Andrew J. Peck
Andrew J. Peck
United States Magistrate Judge

Copies to:
George Fluellen
Donald Siewert, Esq.
Judge Kimba M. Wood